



## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

**[EPA-R06-OAR-2020-0343; FRL-10200-01-R6]**

### **Air Plan Approval; Texas; Clean Air Act Requirements for Nonattainment New Source Review**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is approving portions of the State Implementation Plan (SIP) revisions submitted to the EPA by the State of Texas (“the State”) for the 2008 8-hour ozone National Ambient Air Quality Standard (NAAQS). The SIP revisions being approved describe how CAA requirements for Nonattainment New Source Review (NNSR) are met in the Dallas-Fort Worth (DFW) and Houston-Galveston-Brazoria (HGB) serious ozone nonattainment areas.

**DATES:** This rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID EPA-R06-OAR-2020-0343. All documents in the docket are listed on the <https://www.regulations.gov> web site. Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet. Publicly available docket materials are available electronically through <https://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Ms. Carrie Paige, EPA Region 6 Office, Infrastructure and Ozone Section, 214-665-6521, [paige.carrie@epa.gov](mailto:paige.carrie@epa.gov). Out of

an abundance of caution for members of the public and our staff, the EPA Region 6 office may be closed to the public to reduce the risk of transmitting COVID-19. Please call or e-mail the contact listed above if you need alternative access to material indexed but not provided in the docket.

**SUPPLEMENTARY INFORMATION:** Throughout this document “we,” “us,” and “our” means the EPA.

## **I. Background**

The background for this action is discussed in detail in our March 1, 2021, proposal (86 FR 11913). In that document we proposed to approve portions of two revisions to the Texas SIP submitted to the EPA on May 13, 2020, that describe how CAA requirements for enhanced vehicle inspection and maintenance (I/M) and NNSR are met in the DFW and HGB serious ozone nonattainment areas for the 2008 ozone NAAQS.

Our March 2021 proposal provided a detailed description of the revisions and the rationale for the EPA’s proposed actions, together with a discussion of the opportunity to comment. The public comment period for our March 2021 proposal action closed on March 31, 2021. We received comments during the public comment period from two sources: Earthjustice, on behalf of Achieving Community Tasks Successfully, Coalition of Community Organizations, Downwinders at Risk, Sierra Club, Texas Environmental Justice Advocacy Services, and itself, together with Caring for Pasadena Communities; and Air Law for All (ALFA), on behalf of the Center for Biological Diversity and the Center for Environmental Health.<sup>1</sup> The comments received are available for review in the docket for this rulemaking. The EPA is not finalizing the proposed approval of revisions that address the CAA requirements for vehicle I/M at this time. Those revisions will be

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<sup>1</sup> Henceforth, we refer to Earthjustice and ALFA as “commenters.”

addressed in a separate rulemaking. Our responses to the comments addressing NNSR follow.

## **II. Response to Comments**

*Comment:* Commenters assert that the proposed rule relies on the provisions of the Texas Administrative Code which require new or modified major sources of ozone precursors in ozone nonattainment areas to procure emission offsets for their emission increases through the state's Emission Credit Banking and Trading program. According to the Commenters, these provisions authorize inter-precursor trading (IPT) of NO<sub>x</sub> and VOC emissions which was vacated by the United States Court of Appeals for the District of Columbia Circuit on January 29, 2021. The commenters also argued that EPA's approval of an inter-precursor trade is presumed unless the EPA disapproves the trade during its comment period, according to TCEQ guidance memorandum.

*Response:* The commenter correctly points out that the D.C. Circuit (the court) vacated the portion of the EPA's NNSR regulation at 40 C.F.R. 51.165 that allows IPT to meet the offset requirements for ozone. Following the court's decision, the EPA notified the TCEQ in a letter dated June 17, 2021, that the EPA would no longer approve any IPT trades under the previously approved Texas SIP rules based on the court decision. In a response to the EPA dated June 25, 2021, the TCEQ confirmed that its NNSR IPT provisions cannot function without the EPA's prior approval of each trade, and that the TCEQ has not approved any IPT request in the past without prior approval from the EPA.<sup>2</sup>

The TCEQ also confirmed that without the IPT provisions, its regulations continue to meet the NNSR program requirements at 40 CFR 51.165. EPA agrees that, without the IPT provisions, the Texas SIP regulations meet the CAA's NNSR requirements. The EPA-approved Texas SIP already includes 30 TAC Section 116.12

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<sup>2</sup> The text of each letter is available in the docket to this action.

(Nonattainment and Prevention of Significant Deterioration Review Definitions) and 30 TAC Section 116.150 (New Major Source or Major Modification in Ozone Nonattainment Area). Based on EPA's review of Texas SIP regulations for the NNSR program requirements for serious ozone nonattainment areas, we are approving this portion of the SIP revision.

The EPA does not agree with the commenters that the EPA's approval of an IPT can be presumed under the Texas SIP unless the EPA disapproved the trade during the comment period. Texas has not submitted, and the EPA has not approved the State's guidance document, described by the commenters, as part of the Texas SIP. Nothing in the previously approved Texas regulations establishes a presumption of the EPA's approval of an IPT if the EPA does not communicate its disapproval during a relevant public notice and comment period.

In addition, the EPA's commitment that it will not approve IPT for ozone because of the court's decision is sufficient to render the Texas IPT provisions inoperative for ozone. Texas has confirmed that IPT is not permitted under its regulation without prior EPA approval of a trade. Finally, we would work with Texas to get the inoperative IPT provisions removed in future SIP revisions.

As stated in our proposal, NNSR permitting program requirements specific to serious ozone nonattainment areas are reflected in CAA section 182 and further defined in 40 CFR part 51, subpart I (Review of New Sources and Modifications). The EPA and states may rely on previously approved SIP provisions to meet these NNSR requirements. One way that a state may do so is by providing a SIP revision certifying that the existing SIP requirements are sufficient to meet the requirements of the new classification, as Texas has done here. EPA has reviewed this submission and agrees that the existing provisions referenced in the Texas certification are sufficient to meet the NNSR requirements in 40 C.F.R. 51.165.

These comments did not result in changes to the EPA's proposed approval.

### **III. Final Action**

We are approving portions of the State Implementation Plan (SIP) revisions submitted to the EPA by the State of Texas for the 2008 8-hour ozone NAAQS. Specifically, we are approving the portion of the SIP revision that describes how CAA requirements for NNSR are met in the DFW and HGB serious ozone nonattainment areas.

### **IV. Environmental Justice Considerations**

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” The EPA further defines the term fair treatment to mean that “no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.”<sup>3</sup> For this final action, the EPA conducted screening analyses using the EJScreen (Version 2.0) tool. We conducted the analyses for the purpose of providing information to the public, not as a basis of our final action. The EJScreen analysis reports are available in the public docket for this action. The EPA found, based on the EJScreen analyses, that this final action will

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<sup>3</sup> <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>

not have disproportionately high or adverse human health or environmental effects on communities with EJ concerns, as the changes to NNSR will result in an assurance that the applicable Texas NNSR requirements for the various ozone nonattainment classifications meet the CAA requirements.

## **V. Statutory and Executive Order Reviews**

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the ***Federal Register***. A major rule cannot take effect until 60 days after it is published in the ***Federal Register***. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL***

**REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference,  
Ozone, Volatile organic compounds.

Dated: September 26, 2022.

**Earthea Nance,**  
*Regional Administrator, Region 6.*



For the reasons stated in the preamble, the Environmental Protection Agency amends 40 CFR part 52 as follows:

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

**Subpart SS – Texas**

2. In §52.2270, paragraph (e), the second table titled “EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP” is amended by adding an entry at the end of the table for “Nonattainment New Source Review for the 2008 Ozone NAAQS” to read as follows:

**§52.2270 Identification of plan.**

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(e) \* \* \*

**EPA APPROVED NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES  
IN THE TEXAS SIP**

Name of SIP provision	Applicable geographic or nonattainment area	State submittal/ effective date	EPA approval date	Comments
* * * * *				
Nonattainment New Source Review for the 2008 Ozone NAAQS.	Dallas-Fort Worth and Houston-Galveston-Brazoria nonattainment areas.	May 13, 2020	[Insert the date of publication in the <i>Federal Register</i> ] [Insert Federal <i>Register citation</i> ]	For the Serious classification.